

SOUTH AFRICA / JUDGMENT

Mudau v Ndivhuwo and Others (779/2023)

[2023] ZALMPTHC 11 (12 October 2023)

[2023] ZALMPTHC 11**COURT**

Limpopo High Court, Thohoyandou

BEFORE

TC Tshidada

CASE / FILE NUMBER

779/2023

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Policy
IN THE HIGH COURT OF
SOUTH AFRICA
LIMPOPO LOCAL
DIVISION, THOHOYANDOU
CASE
NO.: 779/2023

REPORTABLE:

YES/NO
OF
INTEREST TO OTHER JUDGES: YES/NO
REVISED
Date
:12/10/2023
TC
TSHIDADA J

In the matter between: MMBENGENI
 SYDNEY MUDAU
 Applicant
 And
 RAPHALALANI
 NDIVHUWO
 First Respondent
 MAKHARE
 TSHINAKAHO
 Second Respondent
 TSHILILO
 MAUMELA
 Third Respondent

JUDGMENT

TSHIDADA J

1

Applicant approached this court on urgent basis seeking the following relief:

1.1 Declaration that this application be heard as a matter of urgency in terms of Rule 6(12) of the Uniform Rules of Court, thereby dispensing with the usual forms and service provided for in the uniform rules of court;

1.2 An interim order interdicting the second respondent from demolishing the erected structure on Stand No. 6[...] situated at Ward 1[...] M[...], Ha-Maumela (“the property”), pending the finalization of the main application under Case No: 779/2023;

1.3 An interim order directing the second respondent not to extend the erected structure or erect further structures on Stand No. 6[...] located at the afore-stated address, pending finalization of the main application afore-stated;

1.4 An interim order interdicting the second respondent from directing the first respondent or any other person to demolish the erected structure, extend the erected structure or erect further structures on the above stated stand, pending finalization of the main application; and that,

1.5 No relief sought against the second and third respondents;

1.6 Lastly, that the first and second respondent be ordered to pay the costs of this application, in the event they oppose this application.

2

The essence of the applicant’s fifth prayer is however startling and puzzling at the same time when one has regard to the preceding and last reliefs the applicant seeks against the second respondent, in that how possible could it be that the applicant seeks certain orders to be granted against the second respondent, yet on prayer 5 of the same notice of motion it is indicated that no

relief shall be sought against the second respondent. In my view, this appears to be an erratic confusion probably caused by the applicant's legal representative's failure to proofread the documents before they were settled, coupled with the attorney's omission to pay attention to the details specifically on this application.

3

Albeit the applicant avers that he resides at Stand No. 3[...] Ha-Luvhimbi Village in Limpopo and that he is the rightful occupier and alleged owner of Stand No. 6[...] referred supra.

4

In his founding papers, applicant claims to have purchased the property under consideration during the year 2016 from the second respondent who happens to be the first respondent's grandmother, for which permission to occupy was subsequently issued by the Mphaphuli Traditional Council upon applicant's payment of the alleged property purchase price and the Traditional Council

authority dues.

5

It is common cause and confirmed by the applicant in the main application that prior to this application he had a romantic relationship with the first respondent wherein a child was borne.

6

It is also undisputed that the second respondent had a right of occupation on Stand No. 6[...] as its owner before the dispute involved in this matter arose.

7

Applicant further avers that it was only during the year 2020 that he presumably in conjunction with the first respondent commenced with building construction over the purchased piece of land. However, he indicates that things turned sour during the year 2021 when his relationship with the first respondent came to an end.

8

The culmination of the discourse that led up to this application is indicated by the applicant to have been the moment the first respondent started claiming ownership of the stand under consideration, allegedly given to her by the second respondent ("her grandmother").

9

Sometime in January 2022, the applicant stated that he approached the Thulamela Municipal offices to have a municipal rates and taxes account opened and recorded in his names over the property, only to be informed that the said property was according to the records still registered in the second respondent's names as the owner.

10 As a result, he was informed that a transfer of ownership letter from the tribal office accompanied by a confirmatory affidavit and identity document of the second respondent, and an upfront payment of R400.00 (Four hundred rands), will be required before change of ownership of the said stand can be processed.

11 He was however not furnished with the requested documents until the 23 February 2023, when he allegedly learnt that the main gate and entrance to the property was chained and padlocked restricting him access.

12 Applicant alleges that he reported the matter to the third respondent to no avail. Neither did the third respondent endeavor to convene a meeting to resolve the dispute between him, the first and second respondents.

13 In summary that concluded the applicant's case and the basis upon which he contends this application had to be brought on an on urgent basis.

14 What is evident though is that the applicant's cause of complaint according to his own papers arose on the 23 February 2023, a period just over seven months ago to date of his hearing of this application. Noteworthy is the fact that nowhere in the applicant's

papers appears an explanation as to why this matter became urgent only after such a lengthy period of time, after the applicant was allegedly deprived of his right to access or occupy the property.

15 Cognizant of the afore-going, this court is inevitably obligated and compelled to determine and adjudicate the timing and the basis upon which the applicant contends and deems the current application urgent, to the extent that this court ought to dispense with the usual forms and service provided for in the Uniform Rules of Court, but to hear this application in compliance with Rule 6(12) prescript and thereby declare that this application is urgent.

16 Only the first and second respondent filed their notice to oppose this application. The notice to oppose was accompanied by their respective answering affidavits transmitted through their instructing attorney, one Messrs Khomola N.R. Attorneys.

17 The respondents answering affidavits were preceded by points in limine raised by the respondents against the issues arising from the applicant's founding papers to wit amongst others;

17.1 Lack of urgency on the applicant's application.

17.2

Non-compliance with Regulation 2 (1)(c) of the Regulation Governing the Administration of Oath appearing on the applicant's founding affidavit, i.e (Improperly commissioned affidavit).

18 The first respondent summarized the facts and gave an insurmountable background of her relationship with the applicant and further

narrated the buildup that led to the current application.

19 She confirmed that indeed during 2015, she was involved in a love relationship with the applicant, and that on or about that time they started residing together at her paternal grandparents' house. Later in 2016, she fell pregnant by the applicant and gave birth to their child in August 2017.

20 During the course of her pregnancy in 2016, and soon after her grandfather's demise, the first respondent stated that the applicant started proposing that the couple should approach the area's local traditional leader and request for change of ownership of the first respondent's deceased's grandfather's stand. The planned change of ownership was to have the stand converted and registered into the applicant's names, because he allegedly intended to build a house for the first respondent and their child. However, the idea was unfortunately dismissed by the first respondent's father soon after it came to his attention.

21 Subsequently, the first respondent recalled and informed the applicant of her grandmother ("the second respondent") unoccupied and/or unused stand which is a subject matter in casu.

22 On or around September 2018, the couple then hatched a plan to approach and deceive the third respondent that the second respondent had given the first respondent the stand under consideration, in order for the applicant to build the first respondent and their child a house, on condition that the stand was registered in his names.

23 The third respondent is said to have acceded to the idea and request, only on condition that prior to the transfer the applicant had to make a payment of R7 000.00 (Seven thousand rand) to the local traditional authority.

24 Before the transaction could be perfected, the first respondent avers that she and the applicant had a fall out due to some infidelities within their relationship. Soon thereafter and during February 2022, the applicant is alleged to have approached the third respondent to issue him with documents confirming his ownership of the second respondent's property or stand, despite the misrepresentation

of facts and the truth to him.

25 It was only in February 2023 that the first respondent decided to go and confess to the second respondent about what she and the applicant did to her stand behind her back.

26 The second respondent then wrote to the applicant through her current attorneys of record informing him about the dispute which by then had already been brought to the attention of the third respondent.

27 The third respondent then called a meeting attended by the applicant, second respondent and also graced by the presence of members of the area's civic association to discuss the issue regarding the applicant and second respondent's dispute over the unlawful transfer and ownership of the second respondent's property.

28 The meeting resolved that what the then couple did to the second respondent was wrong and that ownership of the property should be returned to the second respondent with immediate effect and further that the permission to occupy the property initially issued to the applicant is withdrawn.

29 Aggrieved with the decision, the applicant lodged an appeal against the decision of the third respondent with the area's superior

traditional structure/authority to wit Mphaphuli Traditional Council. Of importance is that his appeal was heard and dismissed on 27th October 2022.

30 As a matter of law, the respondent's counsel took the lead in addressing the court on the points in limine listed above, after which applicant followed with its own reply.

31 Procedurally, the court had to decide and rule on the preliminary issues as in this instance before it could adjudicate the merits of the main application.

32 Respondent's counsel submitted and argued that the applicant distorted the facts involved herein and stated further that applicant was also economic with the truth and in a way sought to mislead the court by withholding crucial evidence on his founding affidavit and deliberately concealed the fact that he had been aware of the dispute between the parties since the year 2022, and also the fact that he was part of every process from the withdrawal of his permission to occupy the property and the dismissal of his appeal back in October 2022.

33 He also bore knowledge of the property ownership dispute even at the time when he was written a letter by the respondent's attorneys regarding his unlawful transfer of the property in question.

34 Therefore, his allegation that the cause of complaint which gave rise to the current urgent application arose on 23 February 2023 when he was deprived access to the property and/or on 13 September 2023 when he noticed developments on the property is void of any truth in all material respects. Neither does it assist him or his case in justifying the hearing of this application on urgent basis a couple of months later after the emergence of the cause of complaint, without tendering any reasonable explanation on what could have caused the delay in launching the current application.

35 I therefore agree with the respondent's counsels' submissions in all fronts, that there is no justification whatsoever

shown by the applicant why this application was brought on urgent basis on issue(s) that when considered, has a clear history which

dates back more than a year ago.

36 Essentially, there respondents argued that the application was nothing other than that of a self-created urgency aimed to usurp the rules and duties of the urgent court and also meant abuse the process and objectives for which this court was intended. I cannot agree more.

37 I find and emphasise that, the applicant's conduct is deserving of condemnation by the court. See in this regard the matter of Lindeque and Others v Hirschs and Others, In re: Prepaid 24 (Pty) Limited (2019/8846).

38 The guidelines with regard to urgent applications are and were set out in the classic case of Luna Meuble Vervaardingers (Edms) Bpk v Makin and Another 1977(4) SA 773 at 782 A – G, wherein it was held that:

“It is incumbent upon the applicant in his founding affidavit to set out explicitly the circumstances and reasons that justify deviation from the forms and services of the application brought as an urgent matter”.

39 Rule 6(12) requires the applicant to set out the circumstances which justify the hearing of an application of an urgent basis and the basis upon which the applicant contends that it would not obtain substantial redress at a hearing in due course.

40 The principles regarding hearing of matters on urgent basis was further enunciated by Notshe AJ and need not belabored herein. See the matter of East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others (11133767) [2011] ZAGPJHC 196 in paras 6 and 7.

41 Brief submissions were made by the respondent's counsel regarding the applicant's defective founding affidavit which lacked compliance of Regulation 2 (1) (a-c) of Regulations Governing the Administration of Oaths which provides thus:

“Before a Commissioner of Oaths administers to any person the oath or affirmation prescribed by Regulation 1, he shall ask the deponent –

- (a) whether he knows and understand the contents of the declaration;
- (b) whether he has any objection to taking the prescribed oath; and
- (c) whether he considers the prescribed oath to be binding on his conscience”.

42 On perusal of the applicant's affidavit, the referred and crucial part of the affidavit is missing.

43 Undoubtedly, the defectiveness of the affidavit is materially clear and apparent on paper for which it cannot be condoned. It therefore and consequently renders the aforesaid affidavit defective pro non scripto. Non-compliance with the rules and regulations governing the courts and their processes countrywide is inexcusable absent any justification for such failure.

44 It is my considered view that the omission complained of on the applicant's affidavit casts serious doubt whether or not the

document was commissioned properly in the presence and before a commissioner of oaths, in compliance with the relevant legislation

and regulations.

45 I therefore exercise my judicial discretion to disallow the impugned affidavit which in my view does not comply with the regulations

prescribed prior the commissioning of an affidavit and administering of an oaths.

46 See in this regard a decision by Kathree-Setiloane J in the matter of ABSA Bank Limited v Botha NO and Others 2013 (5) SA 563 (GNP).

47 Ordinarily, the decision to disallow the applicant's defective affidavit should have disposed of the matter, however, in the interest of justice, I found it imperative that the issue of urgency be simultaneously dealt with so that even if the defect was to be cured, certainly in my view, the facts of the matter would not change, but the issue of urgency would have been decided.

48 That on its own would avoid a possible rehearing of the issues which could be dealt with in one take by this court.

49 My adopted approach would enable the applicant to know soon after the pronouncement of the ruling on the points in limine, which roll the application must be enrolled on, that is as and when the matter becomes ready for hearing.

50 In reply to the afore-going, counsel for the applicant could not make any substantial submission to gainsay submissions made earlier in support of the points in limine taken by the respondents, save for insisting on an unjustified urgency of this application. Expectedly, counsel was unable to circumvent the facts as contained in both parties affidavits.

51 No persuading submissions and/or evidence was submitted by the applicant to justify first and foremost the urgency and the reason for hearing this application on urgent basis in terms of Rule 6(12).

52 Applicant could neither dispute that he had prior knowledge of the dispute in casu and that he was at all material times involved in the processes engaged over the disputed property since the year 2022 between the parties, including the third respondent.

53 Regrettably, applicant's counsel was hamstrung to agree and/or accede to the apparent self-created urgency resorted to by his client in this application for which the ultimate result or consequence should be nothing else other than an order striking off this application from the roll for want of urgency.

54 The applicant has therefore failed to discharge its onus to justify hearing of this application on an urgent basis and/or failed to present a case in conformity with the principles governing urgent applications as envisaged in the authorities referred supra.

55 I therefore dismiss the applicant's allegation and submission that the urgency of this application emerged when he noticed the development on the property on 13 September 2023 on the basis that the proven facts are clear and indicative of the fact that the dispute between the parties was long existing and known by the applicant.

56 Having regard to the papers filed on record and having heard submissions made by the respective counsel, it is my considered view that the respondents successfully made out a case on facts and the law for upholding the two points in limine alluded to herein this judgment with costs against the applicant.

57 This court accordingly confirms the orders granted by this court on the 26th September 2023.

58 In the circumstances, the following orders are made:

58.1 The point in limine in respect of applicant's non-compliance with Regulation 2(1)(a-c) of the Regulation Governing the Administration of Oath is upheld with costs.

58.2 The point in limine in respect of lack of urgency is upheld with costs,

58.3 The applicant is ordered to set down the main application contesting ownership of the piece of land in question ("the property") whenever it becomes ready on a date to be allocated by the Registrar in the opposed motion court roll, failing which, the respondent shall be authorised to approach the court for an appropriate relief.

T C TSHIDADA

JUDGE OF THE HIGH COURT

APPEARANCES: 1. For the Applicant: Mr E Netshipise Instructed by: Mudau Netshipise Attorneys
2. For the 1st & 2nd Respondent: Mr N R Khomola Instructed by: N R Khomola Attorneys 3. Heard on: 26 September 2023 4. Order delivered on: 26 September 2023 5. Written judgment handed down on: 12 October 2023

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